



State of California  
**Commission on Judicial Performance**  
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Date: March 1, 2017

To: Persons and Organizations Interested in Rules Relating to Proceedings of the Commission on Judicial Performance

From: Commission on Judicial Performance  
Victoria B. Henley, Director-Chief Counsel

Subject: Invitation to Comment on Proposed Amendments to Rules of the Commission on Judicial Performance

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The Commission on Judicial Performance reviews its rules every two years, in even-numbered years. (Policy Declaration 3.5.) During the 2016 rules review process, the commission received and considered written rule proposals from numerous groups and organizations. Pursuant to Policy Declaration 3.5, the commission seeks public comment on those proposals it is considering adopting, and where public comment would assist the commission in determining whether the proposed amendment should be adopted. The commission has determined to seek public comment on amendments to rules 116.5 (Negotiated Settlement During Preliminary Investigation), 120(b) (Disqualification upon notice of formal proceedings), 122(g)(2)(a) (Discovery Depositions), 126(d) (Appointment of Conservator), 110 (Advisory Letter After Staff Inquiry), 111(d) (Advisory Letter After Preliminary Investigation), 111.4 (Legal Error), 111.5 (Correction of Advisory Letter), 114(b)(2) (Advisory Letter After Appearance Before the Commission to Object to Notice of Intended Private Admonishment); 116(b)(2) (Advisory Letter After Appearance Before the Commission to Object to Notice of Intended Public Admonishment), and the proposed adoption of a new rule for reconsideration of closed complaints.

Rule proposals submitted to the commission during its 2016 biennial rules review that are not included in the invitation to comment will be discussed in the commission's final public report issued after the public comment and response to comment periods.

The proposed amendments being circulated for public comment with a brief explanation of the changes and a form for submission of comments can be found on the commission's website at <http://cjp.ca.gov> under "Announcements" on the Home page and under "Legal Authority." **The deadline for comments is May 1, 2017.** Thereafter, individuals and organizations may submit responses to comments until May 31, 2017.

Copies of rule proposals, comments and responses to comments are available to the public upon request. (See Policy Declaration 3.5 for the commission's rules review procedures.)

Comments and responses to comments should be submitted in writing by mail or facsimile  
to:

Commission on Judicial Performance  
Attn: Janice M. Brickley, Legal Advisor to Commissioners  
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In the following rule proposals, proposed amended language is reflected with underlines, deleted language with ~~strikeouts~~.

### **Rule Proposal No. 1**

#### **PROPOSED AMENDMENT TO RULE 116.5 TO SPECIFY ATTORNEYS WHO MAY BE DESIGNATED TO NEGOTIATE A PROPOSED SETTLEMENT**

The proposed amendment is as follows:

##### **Rule 116.5 Negotiated Settlement During Preliminary Investigation**

At any time during a preliminary investigation or an admonishment proceeding under rules 113-116, the commission may ~~designate~~ authorize ~~trial counsel~~ legal staff or another ~~designated~~ attorney ~~authorized by the commission~~ to negotiate with the judge a resolution of any matter at issue. A proposed resolution shall be jointly submitted to the commission, which may accept it, reject it or return it to the judge and ~~examiner~~ legal staff ~~or other designated attorney~~ to consider modifications to it. No agreement between the judge and legal staff ~~or other designated attorney~~ is binding unless approved by the commission. A settlement proposal rejected by the commission cannot be used against the judge in any proceedings. After formal proceedings are instituted, settlement negotiations are governed by rule 127.

##### **Explanation of Proposed Amendment**

The California Judges Association proposed that rule 116.5 be amended to specify that an attorney member of the commission staff, in addition to the examiner, may be designated to negotiate a proposed resolution of a matter during a preliminary investigation. The commission agrees that it should have discretion to designate any attorney member of the commission staff to negotiate a settlement during a preliminary investigation or an admonishment proceeding. The proposed amendments would consistently refer to "legal staff or other designated attorney." This would cover the examiner, other legal staff, and outside counsel appointed by the commission.

The California Judges Association also proposed that this rule be amended to allow the chairperson to authorize legal staff to negotiate a settlement. No agreement between the judge and legal staff or other designated attorney is binding unless approved by the commission. (Rule 116.5.) If a majority of the commission is not inclined to consider a disposition without the benefit of an evidentiary hearing, authorizing negotiations would be fruitless. Therefore, in the commission's view, authorization to negotiate a settlement should be approved by the commission.

## Rule Proposal No. 2

### **PROPOSED AMENDMENT TO RULE 120(b) TO AMEND THE STANDARD FOR INTERIM DISQUALIFICATION OF A JUDGE DURING FORMAL PROCEEDINGS**

The proposed amendment is as follows:

#### **(b) (Disqualification upon notice of formal proceedings)**

Before the commission has reached a determination regarding removal or retirement of a judge, the commission may temporarily disqualify a judge without loss of salary upon notice of formal proceedings pursuant to article VI, section 18(b) of the California Constitution if the commission determines that there is substantial evidence that the continued service of the judge is causing immediate, irreparable, and continuing public harm poses a threat of serious harm to the public or to the administration of justice.

#### **Explanation of Proposed Amendment**

Pursuant to the California Constitution, a judge is disqualified from acting as a judge, without loss of salary, while there is pending an indictment or information charging the judge with a felony. (Cal. Const., art. VI, § 18(a).) The constitution also authorizes the commission to disqualify a judge, without loss of salary, upon notice of formal proceedings. (Cal. Const., art. VI, § 18(b).) Rule 120(b), adopted in December 1996, sets the standard for implementation of disqualification pending formal proceedings. The current standard is “if the commission determines that the continued service of the judge is causing immediate, irreparable, and continuing public harm.” Under the rule, the judge must be given notice of the intention to disqualify and an opportunity to respond prior to an order temporarily disqualifying a judge. (Rule 120(b).) Rule 120 also provides for an accelerated disposition of formal proceedings when a judge is temporarily disqualified. (Rule 120(c).) The temporary disqualification remains in effect until further order of the court or until the pending formal proceedings have been concluded. (Rule 120(d).)

The commission proposes that the standard for interim disqualification in subdivision (b) be amended consistent with the standard in the American Bar Association (ABA) Model Rules for Judicial Disciplinary Enforcement and the standard set in the majority of states with provisions for interim disqualification or suspension. The commission’s current standard for disqualification, particularly the requirement that the harm be irreparable, is so high as to make it virtually impossible to order interim suspension under circumstances recognized by a majority of states and the ABA as justifying suspension pending resolution of the matter. The commission has only once temporarily disqualified a judge under rule 120(b). (*Inquiry Concerning Bradley* (1999) 48 Cal.4th CJP Supp. 84.)

The “irreparable” requirement is not included in the ABA Model Rules or in the provisions for interim suspension in other states. Examples of standards set in other states

include: “continued service of a judge is causing immediate and substantial public harm and an erosion of public confidence to the orderly administration of justice” (New Mexico); “upon receipt of sufficient evidence demonstrating that the continued service of any judge is causing immediate and substantial public harm and an erosion of public confidence in the orderly administration of justice and appears to be violative of the Georgia Code of Judicial Conduct” (Georgia); “continued service while proceedings are pending before the Committee poses a substantial threat of serious harm to the administration of justice” (New Jersey); “immediate suspension is necessary for the proper administration of justice” (Michigan); and “judge poses a substantial threat of serious harm to the public or the administration of justice” (Nevada).

The ABA Model Rules for Judicial Disciplinary Enforcement include a provision for interim suspension for conduct other than criminal prosecution, as follows:

#### Section II. General Provisions, Rule 15. Interim Suspension

(3) Other Misconduct. Upon receipt of sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice, the highest court may transfer the judge to incapacity inactive status or suspend the judge pending a final determination in any proceeding under these Rules.

The proposed amendment to rule 120(b) sets a standard for interim disqualification consistent with the ABA Model Rules.

The provisions requiring notice to the judge and an opportunity to respond prior to an order temporarily disqualifying a judge and an accelerated disposition of formal proceedings when a judge is temporarily disqualified would remain the same. The commission is of the view that the proposed amendment would provide greater protection to the public and the administration of justice, while continuing to guarantee the judge’s right to due process.

### Rule Proposal No. 3

#### **PROPOSED AMENDMENT TO RULE 122(g)(2)(a) TO CHANGE “ADMINISTRATIVE OFFICE OF THE COURTS” TO “JUDICIAL COUNCIL”**

The proposed amendment is as follows:

##### **(2) (Discovery Depositions)**

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- a. The judge shall have the right to take depositions of up to four material witnesses, and the examiner shall have the right to take depositions of the judge and up to three other material witnesses. Depositions of commission members or staff are not permitted. Bench officers, other than the respondent judge, and court staff shall be afforded counsel for the deposition, upon request, by the ~~Administrative Office of the Courts~~ Judicial Council.

##### **Explanation of Proposed Amendment**

The proposed amendment reflects that what was previously referred to as the Administrative Office of the Courts is now the Judicial Council.

### Rule Proposal No. 4

#### **PROPOSED AMENDMENT TO RULE 126(d) TO REPLACE “INSANE” WITH “TO BE OF UNSOUND MIND”**

The proposed amendment is as follows:

**(d) (Appointment of conservator)** If the judge is adjudged ~~insane~~ to be of unsound mind or incompetent, or if it appears to the commission at any time during the proceedings that the judge is not competent to act for himself or herself, the commission may petition a court of competent jurisdiction for the appointment of a conservator unless the judge has a conservator who will represent the judge. If a conservator is or has been appointed for a judge, the conservator may claim and exercise any right and privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent, and whenever these rules provide for serving, giving notice or sending any matter to the judge, such notice or matter shall be served, given, or sent to the conservator.

##### **Explanation of Proposed Amendment**

The proposed amendment reflects that the word “insane” is no longer used in the Probate Code.

## Rule Proposal No. 5

### **PROPOSED NEW RULE FOR RECONSIDERATION OF CLOSED COMPLAINT**

The proposed new rule is as follows:

#### RECONSIDERATION OF COMPLAINT.

- (a) A complainant may request reconsideration of a dismissed complaint if, not later than the 60th day after the date of the communication informing the complainant of the dismissal, the complainant provides new *material* evidence of misconduct committed by the judge, that provides a sufficient basis for investigation.
- (b) The commission shall consider every request for reconsideration, submitted in accordance with this rule.
- (c) The commission shall deny a request for reconsideration if the complainant does not meet the requirements under subsection (a). The commission shall notify the complainant of the denial in writing.
- (d) The commission shall grant a request for reconsideration if the complainant meets the requirements under subsection (a).
- (e) After granting a request, the commission shall vote to: (1) affirm the original decision to dismiss the complaint; or (2) reopen the complaint.
- (f) The commission shall notify the complainant of the results of the commission's vote under subsection (e) in writing.
- (g) The commission shall conduct an appropriate investigation of a complaint reopened under subsection (e)(2).
- (h) A complainant may request reconsideration of a dismissed complaint under this section only once.

#### Explanation of Proposed Amendment

Because complainants are not parties to the commission matter, they are not legally entitled to an appellate remedy if the complaint is closed. In practice, the commission does reconsider a closed complaint if new information reflecting a prima facie showing of misconduct is provided. The commission proposes that a process for reconsideration of a complaint be formalized in a rule to provide notice to complainants and a transparent and formalized process.

Adoption of this rule would be subject to receiving additional funding as it would require additional staff time to review requests for reconsideration and present those requests to the commission, and to conduct further investigation when the request is granted.

## **Rule Proposal No. 6**

### **PROPOSAL TO ELIMINATE ADVISORY LETTERS AS A DISCIPLINARY OPTION**

The commission seeks comment on whether the following rules authorizing the commission to issue an advisory letter following a staff inquiry or preliminary investigation should be deleted: rule 110, rule 111(d), rule 114(b)(2), rule 116(b)(2). The deletion of these rules would result in the deletion of rule 111.5 (correction of advisory letter), and an amendment to rule 111.4 (legal error) [to delete reference to advisory letters].

#### **Explanation of Proposed Amendment**

In a written submission of rule proposals, the Center for Judicial Excellence and Court Reform LLC proposed that the commission eliminate private discipline as a disciplinary option. The California Constitution, article VI, section 18(d), adopted by voter initiative, authorizes the commission to privately admonish a judge or former judge found to have engaged in an improper action or dereliction of duty. The commission may not override a constitutional provision by rule. Abolishing the commission's constitutional authority to impose private admonishments would require a constitutional amendment, which must be approved by the California State Legislature and ratified or rejected by the state's voters.

The practice of issuing advisory letters were codified in the rules of court in 1989, and adopted by commission rule in 1996. The California Supreme Court affirmed the commission's authority to issue advisory letters pursuant to commission rules in *Oberholzer v. Commission* (1999) 20 Cal.4th 371. Because advisory letters were created by rule, the commission has discretion to abolish them as a disciplinary option. The commission has not determined whether this would be in the best interest of the public and the administration of justice; however, the commission believes consideration of the proposal would benefit from soliciting the views of the public and the judiciary.